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AZINAL SDN BHD v. JANNATH GANI & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
SUPANG LIAN JCA
B AZIMAH OMAR JCA
[CIVIL APPEAL NOS: W-02(IM)(NCvC)-360-03-2023; W-02(IM)(NCvC)-390-03-2023; W-02(IM)(NCvC)-451-03-2023 & W-02(IM)(NCvC)-484-03-2023]
2 FEBRUARY 2024

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Abstract – *A broad right to appeal is certainly a substantive right that is vested upon the parties at the commencement of any given suit. However, it is not meant to be an absolute right. It is qualified and curtailed by the statutory operation of s. 68 of Courts of Judicature Act 1964 ('CJA'). Distinction must be drawn between a broad right to appeal in an action and an interlocutory right to appeal against an interlocutory application. A substantive amendment, such as the insertion of the new limbs to s. 68(1) of the CJA, that would remove a party's specific right to an interlocutory appeal against the dismissal of a striking out application, would not curtail a party's right to be heard or defend against an action as that party would still have their day in court for trial.*

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CIVIL PROCEDURE: *Jurisdiction – Appellate jurisdiction – Preliminary objection raised – Right of appeal – Whether substantive right – Whether appeal incompetent in view of recent inclusion of s. 68(1)(f) of Courts of Judicature Act 1964 – Whether right of appeal subjected to restrictions or qualifications stipulated under s. 68 – Whether decision of High Court in dismissing striking out application non-appealable – Distinction between broad right to appeal in action and interlocutory right to appeal against interlocutory application – Whether appeal ought to be struck out in limine*

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CIVIL PROCEDURE: *Appeal – Right of appeal – Appellate jurisdiction – Preliminary objection raised – Whether appeal incompetent in view of recent inclusion of s. 68(1)(f) of Courts of Judicature Act 1964 – Whether right of appeal subjected to restrictions or qualifications stipulated under s. 68 – Whether decision of High Court in dismissing striking out application non-appealable – Distinction between broad right to appeal in action and interlocutory right to appeal against interlocutory application – Whether appeal ought to be struck out in limine*

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STATUTORY INTERPRETATION: *Amendment – Legislative amendment – Effect of – Insertion of new limbs to s. 68(1) of Courts of Judicature Act 1964 ('CJA') – Whether intended to have retrospective operation – Whether right of appeal conferred via s. 67 of CJA subjected to restrictions or qualifications stipulated under s. 68 – Whether list of non-appealable matters include decision where High Court dismissed any application to strike out any writ or pleading – Whether to curtail torrent of interlocutory appeals inundating Court of Appeal – Distinction between broad right to appeal in action and interlocutory right to appeal against interlocutory application*

The appeal herein concerned a simple matter but nonetheless, its determination here shall shed crucial light and certainty as to the appellate jurisdiction of the Court of Appeal in view of the recent amendment of the Courts of Judicature Act 1964 ('CJA') *vide* the insertion of the new limbs to s. 68(1) of the CJA namely s. 68(1)(e), (f) and (g). For context, there were four separate appeals filed herein, one of which was an appeal by the appellant against the decision of the High Court in dismissing its application to strike out the respondent's claim ('Appeal 360'). However, at the commencement of the hearing of these appeals, the appellant in Appeal 360 requested that the appellant be permitted to take Appeal 360 on its own and independently from the other three appeals, on the ground that Appeal 360 was the only appeal filed against the judge's decision to dismiss the appellant's application to strike out the respondent's writ and statement of claim while the other three appeals were filed against the judge's decision to allow the respondent's application to amend their statement of claim. The respondent raised a preliminary objection that Appeal 360 was an incompetent appeal in view of the recent inclusion of s. 68(1)(f) of the CJA which now deemed the decision of the High Court (in dismissing a striking out application) to be a non-appealable decision of the High Court. According to the respondent, the appellant had filed its striking out application in encl. 210 on 26 July 2022, one day after the bill for amendments to s. 68(1) of the CJA were passed on 25 July 2022. Thereafter, the High Court Judge dismissed the application on 23 February 2023, which was well after the amendment came into force on 1 October 2022. The respondent pointed out that the new amended s. 68(1)(f) of the CJA clearly restrained any appeals on dismissal of striking out applications. In challenging the preliminary objection, the appellant argued (i) the amended s. 68(1) of the CJA was a legislative amendment. The law is trite that a legislative amendment shall, as a general rule, operate prospectively; (ii) the appellant's right to appeal to the Court of Appeal was a vested right or an accrued right prescribed by a statute (which has constitutional underpinnings *vide* art. 121(1B) of the Federal Constitution ('FC'); (iii) since the right of appeal was a substantive right, the right of appeal vested with the appellant remained intact until the Amendment Act (Act A1661) took effect on

A 1 October 2022. In other words, Act A1661 shall only apply against a suit, or an action filed at the time or after Act A1661 had come into force; and (iv) the removal of the right of appeal could not extend to suits or applications which were already filed before the amending statute came into force. The question that arose was whether the appellant's Appeal 360 was
B a competent appeal in view of the amendments of s. 68(1) of the CJA in particular s. 68(1)(f).

Held (allowing preliminary objection)
Per Azimah Omar JCA delivering the judgment of the court:

C **(1)** Notwithstanding the civil appellate jurisdiction conferred to the Court of Appeal *vide* s. 67 of the CJA, the same statute had also provided a sieving mechanism to limit (or qualify) the civil appellate jurisdiction conferred to the Court of Appeal. One must not lose sight of the pertinent effect of s. 68 of the CJA which explicitly set out the list of non-appealable matters that could not be brought by way of appeal
D before the Court of Appeal. Prior to the enforcement of Act A1661, matters which were non-appealable to the Court of Appeal were spelt out under s. 68(1)(a) to (d) of the CJA. Section 68(1) of the CJA has clearly prescribed that (in so far as right of appeal to the Court of Appeal is concerned) the right of appeal against any decision or order of the
E High Court created by s. 67 of the CJA is not a blanket right of appeal. Section 68 of the CJA clearly prescribed that this conferred right of appeal must be read conjunctively or in tandem with the restrictions imposed by s. 68 of the CJA. Essentially, the right of appeal conferred *via* s. 67 of the CJA shall be subject to the restrictions or qualifications
F stipulated under s. 68 of the CJA. (paras 15-17)

(2) It was never the intention of the legislator to vest an absolute right of appeal to every decision or order made by the High Court to the Court of Appeal (despite such right being a substantive right). The legislator had intended for the s. 67 right of appeal to have its own set of
G limitations, restrictions or qualifications. This intention of the legislator was clearly reflected by having s. 68 embedded within the CJA. The operative words of s. 68(1) clearly reads: 'No appeal shall be brought to the Court of Appeal in any of the following cases.' The recent amendment of the CJA *vide* Act A1661 had explicitly spelt out the
H addition of three more matters which were non-appealable to the Court of Appeal, namely s. 68(1)(f), where a High Court dismissed any application to strike out any writ or pleading. (paras 18 & 19)

(3) By virtue of s. 68 of the CJA, it was fallacious to say that the conferment of the right of appeal under s. 67 (despite being a substantive right) was
I not without its own set of qualifications. The legislator had legislated curtailments or qualifications as to matters decided by the High Court

that were competent to be brought before the Court of Appeal. Therefore, as at 1 October 2022, s. 68(1)(f) was put into force for the very purpose of curtailing the torrent of interlocutory appeals that have inundated the Court of Appeal (well before the parties at the High Court ever had their day in court at trial). (para 20)

(4) The appellant's interpretation of the Amendment Act (leading to the prospective effect of the amendment) would grossly undermine, defeat and flout the very purposes and objectives that the amendment was seeking to achieve. Those main purposes and objectives being (i) to curtail the abuse of interlocutory appeals as a tactic to unnecessarily protract litigation, exhaust counter-parties and to unnecessarily delay or withhold the case from being properly tried before the High Court; (ii) to promote speedy and expeditious determination of suits at trial (without being protracted by unnecessary interlocutory appeals); and (iii) to gradually alleviate the backlog in the Court of Appeal and to avoid the undesirable situation of the Court of Appeal being further overladen and inundated with further filings of interlocutory appeals after the cut-off date of 1 October 2022. (para 24)

(5) The very purpose and objective of the amendment could only be achieved if no further non-appealable matters (under the amendment) are to be filed for interlocutory appeal post the cut-off date of 1 October 2022. A purposive reading of the amendments led to the one conclusion that the legislator intended that the amendments should have a retrospective effect. Hence, Appeal 360 (which was filed after the cut-off date) was indubitably incompetent and must be struck out *in limine*. The purposive approach to interpret the Amendment Act would also be in line with the trite principle that a summary or interlocutory determination of actions should be employed sparingly and in clear and obvious cases only. A grave injustice would ensue when there is unjust deprivation of the right to appeal against a decision of the High Court after a full trial. But such injustice could not be implied upon the Amendment Act's restriction against an appeal against a decision by the High Court to dismiss a striking out application. (paras 27, 28 & 31)

(6) Distinction must be drawn between a broad right to appeal in an action and an interlocutory right to appeal against an interlocutory application. Any substantive amendment to deprive any party's broad right to appeal indeed would affect a party's rights to be heard and to defend against an action, as they are deprived of ventilating against the High Court's decision after they already exhausted their day in court. On the contrary, a substantive amendment that would remove a party's specific right to an interlocutory appeal against the dismissal of a striking out application would not curtail a party's right to be heard or defend against an action

A as that party would still have their day in court for trial. The language of the Amendment to restrict the right to appeal against a decision (in an interlocutory striking out application) was specifically and literally referring to the specific time 'where a High Court dismissed any application to strike out any writ or pleading.' Therefore, the
B prospective application of the amendments shall be examined and applied against the date of the decision and not against the date of the commencement of the suit. Thus, even a prospective application of the amendment would literally mean to affect all decisions dismissing a striking out application meted out after the amendment came into force.
C Therefore, since the judge had only dismissed the appellant's striking out application after the amendment came into force, the amendment would have already been in force to restrain or curtail any appeals to be filed against this interlocutory decision. Appeal 360 was thus struck out. (paras 35 & 36)

D **Case(s) referred to:**

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 FC ***(refd)***

Garikapati Veeraya v. N Subbiah Choudhry & Ors AIR 19 SC 540 ***(refd)***

Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals [2020] 1 CLJ 193 FC ***(refd)***

E *Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd & Another Appeal [2020] 1 CLJ 299 FC* ***(refd)***

Lee Chow Meng v. PP [1978] CLJU 88; [1978] 1 LNS 88 FC ***(refd)***

Lim Phin Khian v. Kho Su Ming [1996] 1 CLJ 529 SC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Lembaga Rayuan Negeri Pulau Pinang & Anor [2005] 4 CLJ 885 CA ***(refd)***

F *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC* ***(refd)***

Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 CA ***(refd)***

Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals [2021] 5 CLJ 581 FC ***(refd)***

G *Zainal Hashim v. Government of Malaysia [1979] CLJU 132; [1979] 1 LNS 132 PC* ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 67, 68(1)(a), (b), (c), (d), (e), (f), (g)

Federal Constitution, art. 121(1B)

Rules of Court 2012, O. 18 r. 19

H *For the appellant (Appeal 360) - M Pathmanathan, Rutheran Sivagnanam, Shirin Pathmanathan & Fatin Muzfirah; M/s R Sivagnanam & Assocs*

For the respondents - Austen Pereira & Zulaikha Aini Mohamed Khair Johari; M/s Zulaikha Aini

Reported by Suhainah Wahiduddin

I

JUDGMENT

Azimah Omar JCA:

[1] The immediate appeal before us concerns a simple matter but nonetheless, its determination here shall shed crucial light and certainty as to the appellate jurisdiction of the Court of Appeal in view of the recent amendment of the Courts of Judicature Act 1964 ("CJA 1964") *vide* the insertion of the new limbs to s. 68(1) of the CJA 1964 namely; ss. 68(1)(e), (f) and (g) of the CJA 1964.

[2] For context, there are four separate appeals filed before us by the parties who were dissatisfied with the decisions rendered by the Kuala Lumpur High Court on 23 February 2023 in civil action WA-22NCvC-629-11-2017. The four appeals were namely:

(i) W-02(IM)-360-03/2023 ("Appeal 360") was an appeal filed by the appellant ("Azinal Sdn Bhd"), who was the sixth defendant in the High Court, against the decision of the learned High Court Judge dated 23 February 2023 in dismissing its application in encl. 210 to strike out the plaintiffs' claim ("encl. 210");

(ii) W-02(IM)-390-03-2023 ("Appeal 390") was an appeal filed by Azinal Sdn Bhd against the decision of the learned High Court Judge dated 23 February 2023 for allowing the plaintiffs' (Jannath Gani (P1), Shahul Hameed (P2), Shirin binti Mobarak Ahmad @ Ahmad (P3)) application in encl. 206 to amend their writ and statement of claim;

(iii) W-02(IM)-451-03/2023 ("Appeal 451") was an appeal filed by the second, fifth, seventh and 11th defendants (Dr Abdul Rahman bin Datuk AS Dawood (D2), Pasla Holdings Sdn Bhd (D5), Madah Pertama Sdn Bhd (D7) and Ikhwan Nasir bin Abdul Rahman (D11)) against the decision of the learned High Court Judge dated 23 February 2023 for allowing the plaintiffs' application in encl. 206 to amend their writ and statement of claim; and

(iv) W-02(IM)-484-03/2023 ("Appeal 484") was an appeal filed by the first, third and fourth defendants (Jamilah binti Sheikh Daud (D1), Mohamed Ibrahim bin Datuk A.S Dawood (D3), Naseem binti Mohamed Abdulla (D4)) against the decision of the learned High Court Judge dated 23 February 2023 for allowing the plaintiffs' application in encl. 206 to amend their writ and statement of claim.

[3] However, at the commencement of the hearing of these four appeals, Dato' M Pathmanathan, the counsel for the appellant in Appeal 360 (Azinal Sdn Bhd) had requested that the appellant be permitted to take Appeal 360 on its own and independently from the other three appeals. This, he requested on the ground that Appeal 360 was the only appeal filed against

A the learned judge's decision to dismiss Azinal Sdn Bhd's application to strike out the plaintiffs' writ and statement of claim. Meanwhile, all the other three appeals were appeals filed against the learned judge's decision to allow the respondents' (plaintiffs') application to amend their statement of claim.

B **[4]** Additionally, Dato' Pathmanathan had informed us that the respondents had raised a preliminary objection in their written submission in respect of the appellant's Appeal 360 on the premise that Appeal 360 was an incompetent appeal and should be struck out *in limine*.

C **[5]** Mr Austen Pereira (the counsel for the respondents) had admitted that the respondent had indeed raised a preliminary objection that Appeal 360 was an incompetent appeal in view of the recent inclusion of s. 68(1)(f) of the CJA 1964 which now deems the decision of the High Court (in dismissing a striking out application) to be a non-appealable decision of the High Court.

D **[6]** Mr Austen Pereira further enlightened us on the underlying facts leading to the incompetency of the appellant's Appeal 360. The appellant had filed its striking out application in encl. 210 on 26 July 2022 and the parties had exchanged their respective affidavits between July 2022 to September 2022. Written submissions in respect of the striking out application were filed by the parties on 7 February 2023. Thereafter, the learned High Court E Judge had dismissed the application on 23 February 2023. Enclosure 210 was filed by the appellant one day After the bill for amendment as to the amendments to s. 68(1) of the CJA 1964 were passed on 25 July 2022. The learned judge rendered his judgment on 7 February 2023 which was well After the amendment came into force on 1 October 2022). The counsel pointed out that the new amended s. 68(1)(f) of the CJA 1964 clearly F restrains any appeals on dismissal of striking out applications.

[7] Mr Austen Pereira contended that Appeal 360 should be struck out *in limine*. Mr Austen Pereira argued that the amendments were in parallel with the judicial principle that when an order does not finally dispose of G rights of the parties, they are not significantly affected because they still would have their day in court. The respondents relied on the Federal Court decision in *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 5 CLJ 581 which *inter alia* held:

> H *To interpret a law based on a provision that no longer reflected the position of the law and was no longer in existence by virtue of an amendment was misconceived and defied both legal logic and the canons of construction and interpretation*. To do so would create a fallacious precedent that would inevitably lead to unprecedented consequences.
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> (emphasis added)

I **[8]** In challenging the preliminary objection (and in an attempt to bring Appeal 360 outside the ambit of the recent amendments), Dato' Pathmanathan had presented his arguments which can be summarised as follows:

(i) the amended s. 68(1) of the CJA *via* Act A1661 was a legislative amendment. The law is trite that a legislative amendment shall as a general rule, operate prospectively. If the legislator intended that the legislative amendment to have a retrospective operation, such retrospective effect must be stated in clear and unambiguous terms or language. In support of this contention, the appellant's counsel relied on the decisions of the Privy Council and the Federal Court namely; *Zainal Hashim v. Government of Malaysia* [1979] CLJU 132; [1979] 1 LNS 132; [1979] 2 MLJ 276; *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577; [2002] 2 MLJ 673; *Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd & Another Appeal* [2020] 1 CLJ 299; *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals* [2020] 1 CLJ 193;

(ii) the appellant's appeal *vide* Appeal 360 was an appeal against the decision of the High Court for dismissing the appellant's application to strike out the respondents' claim. The appellant's right to appeal to the Court of Appeal was a vested right or an accrued right prescribed by a statute (which has constitutional underpinnings *vide* art. 121(1B) of the Federal Constitution). The CJA 1964 *via* its s. 67 had created such right and had vested the Court of Appeal with the necessary jurisdiction to exercise its power in hearing and determining appeals arising from the decision or order from the High Court;

(iii) the legal principle established by a plethora of authorities dictates that the right of appeal is a substantive right and not a mere procedural right. Since the right of appeal is a substantive right, the right of appeal vested in the appellant will remain intact until the Amendment Act (Act A1661) ("Amendment Act/amendments/Act A1661") took effect on 1 October 2022. In the absence of explicit words of the amending statute that the amendment should operate retrospectively, Act A1661 must operate prospectively. Considering this prospective operation of Act A1661, the amendment should not retrospectively disturb the appellant's substantive right to appeal (which was allegedly vested upon the appellant since 2017 (the time the action was first filed)). In other words, Act A1661 shall only apply against a suit or an action filed at the time or after Act A1661 had come into force; and

(iv) the right of appeal was vested on the appellant at the time of the suit being filed or commenced. This right is still in existence when the decision dismissing the striking out application was meted by the High Court. Act A1661 cannot apply here when the right of appeal was already vested in the appellant since the commencement of the suit. This removal of the right of appeal cannot extend to suits or applications which were already filed before the amending statute came into force.

A **Our Analysis (Purposive Approach Preferred Over Literal Approach Of Statutory Interpretation)**

[9] Arising from the preliminary objection raised by the respondents, the question is whether the appellant's Appeal 360 is a competent appeal before us in view of the amendments of s. 68(1) CJA 1964 in particular s. 68(1)(f) of the CJA 1964. If the appellant's Appeal 360 is indeed an incompetent appeal by reason of the legal impediment following the amendment to s. 68(1) of the CJA 1964, then Appeal 360 must be struck out *in limine*.

[10] Now, it must be observed that pursuant to Act A1661 (which came into force on 1 October 2022 *vide* the Federal Government Gazette dated 19 September 2022), s. 68 of the CJA 1964 was amended with the insertion of paras. (e) to (g) which read as follows:

> Section 68 Non-appealable matters
>
> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand Ringgit, except with the leave of the Court of Appeal:
>
> (b) where the judgment or order is made by consent of parties;
>
> (c) where the judgment or order relates to costs only, which by law are left to the discretion of the Court, except with the leave of the Court of Appeal;
>
> (d) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final;
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> *(e) where a High Court dismissed any application for a summary judgment;*
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> *(f) where a High Court dismissed any application to strike out any writ or pleading; and*
>
> *(g) where a High Court allowed any application to set aside a judgment in default.*
>
> (emphasis added)

[11] To determine the competency of the appellant's Appeal 360, it is apposite for us to first appreciate the historical context and background of CJA 1964 in respect of the 'right to appeal'. It must be observed that prior to the establishment of the Court of Appeal on 24 June 1994, all appeals in civil matters from the High Court shall lay before the then Supreme Court. When s. 67 of the CJA 1964 was amended by a blanket amendment by Act A886 (which came into force on 24 June 1994) the words "Supreme Court" were replaced by the words "Court of Appeal". Act A886 had amended

s. 67 conferring the Court of Appeal the jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter instead of the Supreme Court. On 25 June 1994, the Federal Constitution was amended for the establishment of the Court of Appeal *vide* Act A855.

[12] By the operation of s. 67 of the CJA 1964, any decision or order of the High Court is appealable to the Court of Appeal. Thus, the provision thereby conferred the right of appeal to any litigant who is dissatisfied with any decision or order rendered by the High Court (and thus, clothed the Court of Appeal with its appellate jurisdiction).

[13] Regarding the right of appeal conferred to litigants by virtue of s. 67 of the CJA 1964, we have no reservations against the appellant's contention that the right of appeal under s. 67 of the CJA 1964 is a statutory right established by legislation and is a substantive right and not merely a procedural right.

[14] We also have no qualms with the appellant's contention that any legislative amendment to remove a substantive right could only apply prospectively and not retrospectively unless it is so expressed in clear terms within the amendment. This legal proposition had been clearly upheld in all the cases cited by the appellant's counsel:

(i) *Zainal Hashim v. Government of Malaysia* [1979] CLJU 132; [1979] 1 LNS 132; [1979] 2 MLJ 276:

On issue of retrospectivity

> Lord Evershed M.R. in *Hutchinson v. Jauncey* [1951] 1 KB 575 at p 579 where he doubted "whether the principle ought to be expressed in quite such precise language as Jessel M.R. used in *In re Joseph Suche & Co Ltd* (1875) 1 Ch D 48." In that case Lord Jessel had said:
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> > It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any rights of action, its enactments, unless in express terms they apply to pending actions, do not affect them.

(ii) *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577; [2002] 2 MLJ 673:

> In the Courts of Judicature Act (Amendment) Act 1998, *the legislature did not expressly state that the amendment is retrospective or even by necessary intendment. It is my view therefore that the amendment removing the consent of the parties is not retrospective as it affects the substantive right of the applicant and it is not a matter of procedure.*
>
> (emphasis added)

(iii) *Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd & Another Appeal* [2020] 1 CLJ 299:

> [61] It is therefore clear that *courts will be slow in concluding that a statute would have retrospective effect if such construction will consequently impact vested rights, contracts, transactions or impose new duties and obligations in relation to past transactions* for to do so would be contrary to the presumption that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction. *The basis of this presumption in this area of the law is no more than simple fairness, and justice which ought to be the basis of every general rule. It should be observed that this is another dimension or a broader presumption in the approach in determining whether legislation has retrospective application*. It will be remembered that Lord Scott in *Wilson v. First Country* in para 153 succinctly stated that there is a common law presumption that a statute is not intended to have retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect.
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> (emphasis added)

(iv) *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals* [2020] 1 CLJ 193:

> (2) In the absence of express words, a statute, notwithstanding whether it is procedural or substantive, could not be applied retrospectively to impair a substantive right. This settled legal position accords well with and further amplifies those statutory provisions of the Interpretation Acts 1948 and 1967 ('IA'). The CIPAA, in itself, does not contain any provision stating that it has retrospective application. *Parliament clearly did not exercise its Legislative power, pursuant to art. 66(5) of the Federal Constitution and ss. 2(3), 19(1) and 43(a) of the IA to enact the CIPAA with retrospective effect*.
>
> (emphasis added)

(see also: *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 CLJ 491)

[15] Be that as it may, we must also be mindful that notwithstanding the civil appellate jurisdiction conferred to the Court of Appeal *vide* s. 67 of the CJA 1964, the same statute had also provided a sieving mechanism to limit (or qualify) the civil appellate jurisdiction conferred to the Court of Appeal. In this instance, one must not lose sight of the pertinent effect of s. 68 of the CJA 1964. Section 68 of the CJA 1964 had explicitly set out the list of non-appealable matters that cannot be brought by way of appeal before the Court of Appeal.

[16] It must be noted that prior to the enforcement of Act A1661, matters which are non-appealable to the Court of Appeal were spelt out under s. 68(1)(a) to (d) of the CJA 1964. Section 68(1) of the CJA 1964 has clearly prescribed that (in so far as right of appeal to the Court of Appeal is concerned) the right of appeal against any decision or order of the High Court created by s. 67 of the CJA 1964 is Not A Blanket Right Of Appeal. Section 68 of the CJA 1964 clearly prescribed that this conferred right of appeal must be read conjunctively or in tandem with the restrictions imposed by s. 68 of the CJA 1964.

[17] Essentially, the right of appeal conferred *via* s. 67 of the CJA 1964 shall be subject to the restrictions or qualifications stipulated under s. 68 of the CJA 1964.

[18] In our view, it was never the intention of the legislator to vest an absolute Right of Appeal to every decision or order made by the High Court to the Court of Appeal (despite such right being a substantive right). The legislator has intended for the s. 67 right of appeal to have its own set of limitations, restrictions or qualification. This intention of the legislator was clearly reflected by having s. 68 embedded within the CJA 1964. The operative words of s. 68(1) clearly reads: "No appeal shall be brought to the Court of Appeal in any of the following cases:

[19] Having said that, we are mindful that prior to Act A1661, the list of non- appealable matters under s. 68(1) of the CJA 1964 does not include a decision of the High Court dismissing a Striking Out application by the High Court (to be a non-appealable matter). However, the recent amendment of the CJA *vide* Act A1661 had explicitly spelt out the addition of three more matters which are non-appealable to the Court of Appeal, namely:

> "Section 68(1)(e): where a High Court dismissed any application for a summary judgment;"
>
> Section 68(1)(f): where a High Court dismissed any application to strike out any writ or pleading; and
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> Section 68(1)(g): where a High Court allowed any application to set aside a judgment in default.

[20] To our minds, by virtue of s. 68 of the CJA 1964, it is fallacious to say that the conferment of the right of appeal under s. 67 (despite being a substantive right) was not without its own set of qualifications. The legislator had legislated curtailments or qualifications as to matters decided by the High Court that are competent to be brought before the Court of Appeal. Therefore, it is our considered view that as at 1 October 2022, s. 68(1)(f) was put into force for the very purpose of curtailing the torrent of interlocutory appeals that have inundated the Court of Appeal (well before the parties at the High Court ever had their day in court at trial).

[21] Now, apart from the debate on the nature of the right of appeal (whether substantive or procedural) the parties failed to consider the manner and method that statutes ought to be read or interpreted. Indeed, a literal interpretation of a statute is only But One method out of numerous other valid methods of statutory interpretation.

[22] One of the celebrated methods of statutory interpretation would be the Purposive Approach to statutory interpretation. This purposive approach becomes exceedingly necessary and relevant, when the literal reading of the act (notwithstanding principal or amendment act) would lead to an undesirable meaning or effect that flouts the legislative intent of parliament or the provision.

[23] This preference for the purposive approach of statutory interpretation has been upheld by the Federal Court in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57; [2002] 2 MLJ 11:

> The purposive approach has been adopted by our courts following the English cases. Chang Min Tat FJ, speaking for the Federal Court in *United Hokkien Cemetries, Penang v. Majlis Bandaran, Pulau Pinang* [1979] 2 MLJ 121 in considering whether the columbarium should be exempted from assessment just like the cemetery grounds and the crematorium, stated at p. 123:
>
> > The question of the determination of the exact nature and extent of a taxing act is rather different from that of the nature and extent of exemptory provisions. Then, in my view, *it is a matter for the purposive approach to replace the literal*. As was said by Lord Diplock in *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd* [1971] AC 850 at p 899, *the Literal Method of construction is now completely Out Of Date and has been replaced by a 'purposive approach*'. It ought to be noted that this purposive approach is not a modem fashion. Since the 17th century, it has been the task of the judiciary to interpret an Act 'according to the intent of them that made it': Coke 4 Inst 330.
>
> On the same page, His Lordship proceeded to quote a passage in *Northman v. Barnet Council* [1978] 1 WLR 221 where Lord Denning MR said at p 228:
>
> > In all cases now in the interpretation of statutes, we adopt such a construction as will 'promote the general legislature purpose' underlying the provision. It is no longer necessary for judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.

This purposive approach has now been given statutory recognition by our Parliament enacting s 17A in the Interpretation Acts 1948 and 1967 (Act 388) ('the Acts') which reads:

> In the interpretation of a provision of an Act, a construction that *would promote the purpose or object underlying the Act (Whether That Purpose Or Object Is Expressly Stated In The Act Or Not)* shall be preferred to a construction that would not promote that purpose or object.

Recently, the Federal Court in a majority judgment in *Lam Kong Co Ltd v. Thong Guan Co Ptd Ltd* [2000] 4 MLJ 1, Mohamed Dzaiddin FCJ (now CJ Malaya) took the purpose or object of the legislature as provided by s. 17A of the Acts for the construction of s. 68(1)(a) of the CJA on the 'filter' principle.

[24] To our minds, the appellant's interpretation of the Amendment Act (leading to the prospective effect of the amendment) would grossly undermine, defeat, and flout the very purposes and objectives that the amendment was seeking to achieve. Those main purposes and objectives being:

(i) to curtail the abuse of interlocutory appeals as a tactic to unnecessarily protract litigation, exhaust counter-parties, and to unnecessarily delay or withhold the case from being properly tried before the High Court;

(ii) to promote speedy and expeditious determination of suits at trial (without being protracted by unnecessary interlocutory appeals); and

(iii) to gradually alleviate the backlog in the Court of Appeal and to avoid the undesirable situation of the Court of Appeal being further overladen and inundated with further filings of interlocutory appeals after the cut-off date of 1 October 2022.

[25] The above purposes and objectives were clearly reflected within the Minister's speech as recorded in the Parliament's Hansard on 25 July 2022:

> Ucapan Yang Amat Arif, Ketua Hakim Negara, semasa Majlis Pembukaan Tahun Perundangan 2020, telah pun menyatakan, dengan izin, "The Judiciary has to *constantly introduce measures to meet the constantly evolving problems arising in terms of the workload of the Judiciary. A perennial problem is the increasing case load. The Ever Increasing Interlocutory Appeals Affect The Court Of Appeal The Most. In fact, the Court of Appeal has become so inundated with interlocutory appeals, which currently stand at around 1,200 appeals that the Judiciary needed to co-opt special Court of Appeal panels* comprising Federal Court judges to reduce the heavy workload in the Court of Appeal.
>
> ...

A Kaedah perubahan substantif yang dicadangkan ialah dengan mengehadkan rayuan dari Mahkamah Rendah ke Mahkamah Tinggi dan dari Mahkamah Tinggi ke Mahkamah Rayuan *dengan mengehadkan rayuan dalam kes-kes permohonan interlokutori yang tidak memprejudiskan hak pihak-pihak*.

B ...

Kesan kepada pindaan ini akan memperlihatkan, hanya kes yang mempunyai merit sahaja yang akan didengarkan di Mahkamah Rayuan, dan menjadikan *pentadbiran kehakiman lebih efektif dan masa serta kos pihak-pihak yang terlibat kini dapat dijimatkan tanpa menjejaskan keadilan dan hak mana-mana pihak*.

C (emphasis added)

[26] In fact, the Minister's speech had already addressed the supposed 'prejudice' against the appellant's 'right of appeal' (argued by the appellant) by clearly demarcating and distinguishing the broad right of appeal to Appeal against a decision upon merits by the High Court, and the specific right to
D an interlocutory appeal. The Minister explained that the removal of a right to an interlocutory appeal Does Not prejudice or vitiate a litigant's broad right of appeal. The Minister further explained that such removal shall not affect the litigant's right to be heard at full trial and the litigant would still attain the right to appeal against that decision after full trial:

E Mesyuarat Jawatankuasa Kaedah-kaedah antara lainnya, pada tahun 2019 dan tahun 2020 bersetuju supaya Akta 91 ini dipinda bagi memperuntukkan mengenai had untuk merayu bagi kes-kes interlokutori sivil seperti yang dinyatakan di atas *dan cadangan itu tidaklah akan melupuskan hak pihak-pihak yang merayu dan didengar*.

F *Hal ini kerana pihak masih lagi mempunyai ruang untuk menghujahkan kes dalam perbicaraan penuh dan mahkamah akan memberikan penghakiman bagi berdasarkan merit sesuatu kes dengan asas ataupun fundamentals iaitu akses kepada keadilan masih kekal dan tidak terjejas*.

(emphasis added)

G **[27]** It is fairly obvious to us that the very purpose and objective of the amendment could only be achieved if no further non-appealable matters (under the amendment) are to be filed for interlocutory appeal post the cut-off date of 1 October 2022. A purposive reading of the amendments, in our view, leads to the one conclusion that the legislator intended that the
H amendments should have a retrospective effect. Hence, Appeal 360 (which was filed after the cut-off date) was indubitably incompetent and must be struck out *in limine*.

[28] Further, we say that the purposive approach to interpret the amendment act would also be in line with the trite principle that summary
I or interlocutory determination of actions should be employed sparingly and in clear and obvious cases only.

[29] For completeness, we will address the appellant's contention that the retrospective application of the Amendment Act would unjustly deprive the appellant of its substantive 'right to appeal' against the High Court's jurisdiction as the appellant would be deprived of its rights to fully ventilate its dissatisfaction before the case is finally disposed of at the High Court.

[30] The appellant has relied on Malaysian and Indian case law to advance this right of appeal (said to have been vested at the commencement of a suit) argument, but we find this to be sorely misplaced. This is simply because all the case laws relied on by the appellant dealt with the right to appeal as against decisions meted out after full trial (in which the substantive rights, and merits of the cases had already been fully ventilated, exhausted, and determined by the court.) Thus, none of the appeals in those cases cited would have been caught within the exceptions listed in s. 68(1) of the CJA 1964. Nor would it be applicable *mutatis mutandis* to Appeal 360 as the parties have yet to have their respective day in court to ventilate their cases *vide* a full trial. Hence, it cannot be said that the appellant in Appeal 360 would be prejudiced in the same way as had occurred in the cases cited, as the appellant's right to appeal and right to be heard at trial remains intact.

[31] A grave injustice, in our view, would ensue when there is unjust deprivation of the right to appeal against a decision of the High Court after full trial. But such injustice cannot be implied upon the Amendment Act's restriction against an appeal against a decision by the High Court to dismiss a striking out application:

Malaysian authorities:

(i) *Lim Phin Khian v. Kho Su Ming* [1996] 1 CLJ 529; [1996] 1 MLJ 1.

> It must be noted that the appeal filed by the appellant in *Lim Phin Khian* was against the decision of the High Court after a full trial was concluded (where parties had ventilated their case at full length). The Court in *Lim Phin Khia* did not deal with the right to file an interlocutory Appeal (where parties have yet to ventilate their cases at trial).

(ii) *Majlis Perbandaran Pulau Pinang v. Lembaga Rayuan Negeri Pulau Pinang & Anor* [2005] 4 CLJ 885.

> This case had neither factual nor legal relevance whatsoever to the appeals before us. The alluding to the 'Right of Appeal' was merely an *obiter* mentioned in passing. The Court of Appeal there, was dealing with the question whether a Judicial Review Application to the High Court was the correct procedure as opposed to an appeal to the Lembaga Rayuan Negeri Pulau Pinang under its vested appellate Jurisdiction under Section 23(1) of the Town and Country Planning Act 1976. At no point in time did this case deal with the 'Right to Appeal' as against any decision of the High Court.

(iii) *Lee Chow Meng v. PP* [1978] CLJU 88; [1978] 1 LNS 88; [1978] 2 MLJ 36.

> In *Lee Chow Meng*, the parties' substantive rights and merits had been heard and concluded. The appellant had been convicted and sentenced by the President of the Sessions Court. Yet again, the Appeal in *Lee Chow Meng* referred to an Appeal against a decision meted out after full trial, prosecution, conviction, and sentencing. The decision in *Lee Chow Meng* cannot simply apply *mutatis mutandis* to the interlocutory appeal before us.

Indian Authorities:

(i) *ECGC Limited v. Mokul Shriram Epc Jv* (2022).

> *ECGC Limited* has no factual or legal relevance to the appeal before us as the appeal there concerned the right of appeal against the decision of an inferior tribunal to a superior tribunal.

(ii) *Garikapati Veeraya v. N Subbiah Choudhry & Ors* AIR 19 SC 540

> In similar fashion of irrelevance, the appeal in *Garikapati* also dealt with the decision of the TRIAL COURT in which the parties' respective cases had already been ventilated at full length at trial (which was certainly NOT the case in Appeal 360 before us)

[32] We must emphasise that all the above cases relied upon by the appellant by and large dealt with appeals following the decisions of the courts after the parties had been given their day in court in a full trial to ventilate their claims and their defences.

[33] Thus, if the appellants in those cases were deprived of their right to appeal after they have had their one and only opportunity to have their day in court (at trial), such a deprivation would certainly deny their real substantive right of appeal in the fullest sense. The same cannot be said to an interlocutory appeal (where the parties are yet to have their respective day in court).

[34] It is obvious that a striking out application under O. 18 r. 19 of the ROC 2012 is an interlocutory application which seeks to dispose clear and obvious cases *vide* summary procedures and by way of affidavit evidence. Failing a striking out application does not at all impede on a party's right to be heard at trial *via* a full-blown trial where *viva voce* evidence will be presented.

Savings (The Appellant's Contention Still Fails Even With Prospective Application Of The Amendments)

[35] Even assuming that we are wrong in the retrospective operation of the amendments, a literal and prospective application of the same amendments would still veer in favour of the respondent's preliminary objection. This can be explained in the following manner:

(i) the broad right to appeal is certainly a substantive right. It is a right that is vested upon the parties at the commencement of any given suit;

(ii) but the broad right to appeal (although substantive) is also not meant to be an absolute or blanket right. It is qualified and curtailed by the statutory operation of s. 68 of the same vesting Act (CJA 1964);

(iii) distinction must be drawn between a broad right to appeal in an action ("broad right to appeal"), and an interlocutory right to appeal against an interlocutory application;

(iv) any substantive amendment to deprive any party's broad right to appeal indeed would affect a party's rights to be heard and to defend against an action, as they are deprived of ventilating against the High Court's decision **after they already exhausted their day in court**. On the contrary, a substantive amendment that would remove a party's specific right to an interlocutory appeal against the dismissal of a striking out application would not curtail a party's right to be heard or defend against an action **as that party would still have their day in court for trial**;

(v) the language of the amendment to restrict the right to appeal against a decision (in an interlocutory striking out application) was specifically and literally referring to the **Specific Time "where a High Court dismissed any application to strike out any writ or pleading**";

(vi) therefore, the prospective application of the amendments shall be examined and applied against the **date of the decision** and Not against the date of the commencement of the suit;

(vii) thus, even a prospective application of the amendment would literally mean to affect all decision dismissing a striking out application **meted out after the amendment came into force**; and

(viii) therefore, since the learned judge had only dismissed the appellant's striking out application **after the amendment came into force**, the amendment would have already been in force to restrain or curtail any appeals to be filed against this interlocutory decision.

[36] In view of the above deliberations, we hereby allow the preliminary objection raised by the respondents and thus, Appeal 360 is struck out.

[37] We will now proceed to hear the other three appeals.